IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

IN RE: PETITION OF
KNOX COUNTY PUBLIC DEFENDER

Docket No. 174552-2

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Petitioner, the Knox County Public Defender ("Public Defender"), through counsel and in compliance with this Court's Order of May 7, 2009, submits this Brief in Support of the relief sought in his Petition for Writ of Certiorari.

Procedural History

By early 2008, the caseloads handled by attorneys in the Knox County Public Defender's Office ("Public Defender's Office") had reached the point where they far exceeded nationally accepted professional standards. As a result, the Public Defender filed a Petition with the General Sessions Court of Knox County on March 26, 2008, alleging that further misdemeanor appointments from that Court would cause the attorneys in the Public Defender's Office to be in violation of Rule 13, Section 1(e)(4)(D), Rules of the Supreme Court of Tennessee, and asking that the Public Defender's Office be excused from further appointments. Although the caseloads carried by all lawyers in the Public Defender's Office in all Knox County criminal courts were (and continue to be) excessive, the Public Defender proposed limiting appointments in the Misdemeanor Division of the General Sessions Court as the most economical and practical solution to the problem of overwhelming caseloads rather than asking for relief in each of the criminal courts of Knox County.

An en banc hearing was held before the five General Sessions judges on June 10, 2008, and on February 25, 2009, the General Sessions Court issued an Order denying the

relief requested. The Order was not final, and therefore no appeal was available. (Order of this Court, June 25, 2009).

Because the caseloads continued to exceed professional standards and the Public Defender's Office believed that it was entitled to the relief requested as a result of uncontroverted proof introduced at the June 10 hearing and a factual finding made by the General Sessions Court in its Order, the Public Defender's Office filed a Petition for Writ of Certiorari with this Court on March 9, 2009. By Fiat issued on March 10, 2009, the Writ of Certiorari was issued to the Clerk of the General Sessions Court for Knox County, transmitting the record to this Court for review. A scheduling conference was held on April 28, 2009. On May 7, 2009, this Court issued an Order providing for 1) a briefing and argument schedule for a pending Motion to Dismiss filed by the Administrative Office of the Courts ("AOC") and, 2) as necessary, briefing and argument on the merits of the Petition then before this Court for review.

Following a May 26, 2009, hearing, this Court issued an Order on June 25, 2009, denying the dismissal of the Petition sought by the AOC. Petitioner's Brief on this Court's review of the decision below is due on August 13, 2009, and a hearing on the merits of the Petition is set for September 3, 2009.

Factual History

The caseloads of lawyers in the Public Defender's office in all of the criminal courts in Knox County are overwhelming. For example, each attorney handling misdemeanors in the Public Defender's Office is assigned approximately 900 cases each year. (Transcript, June 10, 2008 hearing, at pp. 21-22) This individual caseload exceeds recognized professional standards. Testimony from Assistant Public Defenders at the

hearing confirmed that they were not able to represent appropriately all of their assigned clients.

A former law school dean and ABA consultant, Norman Lefstein, testifying as an expert at the General Sessions Court hearing, stated:

> Q. Do you have an opinion about the overall caseload of the Public Defenders office in Knox County?
>
> R. Yes, I do. It's excessive. I think that it interferes with the ability of the lawyers to provide competent representation as required by the Rules of Professional Conduct. I think it interferes with the ability to be effective under the Sixth Amendment, and I think it constantly jeopardizes the fairness of the proceedings. And, frankly it ...[risks] the potential for genuinely innocent people pleading guilty to offenses to which they ought not to plead and sometimes risking a conviction of actually innocent people. (Testimony of Dean Norman Lefstein, Transcript, June 10, 2008 hearing, p. 101)

Professor Jerry Black of the University of Tennessee College of Law testified that in his opinion the caseloads of the attorneys in the Public Defender's Office prevented those attorneys from providing representation that met either professional or constitutional standards. (Testimony of Professor Jerry Black, Transcript, June 10, 2008 hearing, p. 151)

The General Sessions Court, sitting en banc, heard additional testimony from attorneys in the Public Defender's Office, from private attorneys in Knoxville familiar with the Public Defender's Office and criminal practice in Knox County, and from others. Based upon the testimony before it, the General Sessions Court agreed with Dean Lefstein and Professor Black, and made a finding of fact that "the attorneys in the Public Defender's Office carry case loads that exceed national criminal justice standards and goals." (Order, February 25, 2009)

Despite finding that the caseloads in the Public Defender's Office were not in accordance with professional standards, and, therefore, violative of Rule 13 of the Tennessee Supreme Court, the General Sessions Court denied the relief requested by the Public Defender, requiring the attorneys in the Public Defender's Office to provide representation under the burden of overwhelming caseloads.

Two Assistant Public Defenders testified at the June 10, 2008 hearing. The undisputed evidence before the General Sessions Court was that with respect to the ABA Standards and because of the heavy caseloads they cannot meet the ethical and professional standards. Jamie Poston testified "[I] don't think that I can really say that I'm doing what I should be doing." (Transcript of June 10, 2008 hearing, p. 87) Another Assistant Public Defender testified that because of her current caseloads "Most of my clients" are not "competently represent[ed]... according to the standards." (Testimony of Christy Murray, Transcript of June 10, 2008 hearing, p. 92) The General Sessions Court accepted a stipulation that all of the attorneys in the Public Defender's Office would offer testimony consistent with that of Ms. Poston and Ms. Murray. (Transcript of June 10, 2008 hearing, pp. 92-93)

The Public Defender seeks relief here from this fundamentally illegal ruling of the General Sessions Court, which violates Rule 13, Section 1(e)(4)(D), Rules of the Supreme Court of Tennessee.

Summary of Argument

1. The Tennessee Supreme Court Rules require that a court shall not make an appointment of counsel from the Public Defender's Office if that office "makes a clear and convincing showing that adding the appointment to

counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards." (Rule 13, Section 1(e)(4)(D), Rules of the Supreme Court of Tennessee)

2. The Knox County General Sessions Judges found, after a full-day hearing, that the continuing appointment of attorneys in the Public Defender's Office to misdemeanor cases causes "attorneys in the Public Defender's Office [to] carry caseloads that exceed national criminal justice standards and goals, and were therefore, not in accordance with professional accordance standards. (Order, February 25, 2009)
3. The Supreme Court of Tennessee has held that an Order that is contrary to a clearly established directive is "illegal." State v. Odom, 292 S.W.2d 23 (Tenn. 1956)
4. This Court may grant relief, pursuant to a Writ of Certiorari, for several reasons, including when an action by a lower court, not subject to appeal, represents a "fundamental illegality." State v. Johnson, 569 S.W.2d 808 (Tenn. 1978)
5. The February 25, 2009 Order of the General Sessions Court, finding that "attorneys in the Public Defender's Office carry case loads that exceed national criminal justice standards and goals," triggered the mandatory provisions of Rule 13, Section 1(e)(4)(D), Rules of the Supreme Court of Tennessee, and further misdemeanor appointments should have been prohibited.

6. Because such appointments were not prohibited in spite of this finding and the mandatory nature of Rule 13, the February 25, 2009, Order of the General Sessions Court is fundamentally illegal, and this Court should grant the relief requested in the original Petition through this Writ of Certiorari.

Argument

1. **A court shall not make an appointment of counsel from the Public Defender's Office if that office "makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards." (Rule 13, Section 1(e)(4)(D), Rules of the Supreme Court of Tennessee)**

The requirements of Rule 13, Section 1(e)(4)(D), Rules of the Supreme Court Tennessee, are clear and mandatory. In this case, the General Sessions Court was prohibited from making additional appointments of attorneys from the Public Defender's Office once that office made a "clear and convincing showing" that any additional appointments would cause its representation of its clients to fail to meet "constitutional and professional standards."

The General Sessions Court agreed that the requisite "clear and convincing" showing had been made – but then refused to take the mandatory next step and cease appointments in the Misdemeanor Division, which the Public Defender suggested as the least disruptive and most economical way to relieve the problems caused by the excessive caseloads. This Court should correct that error.

2. **The continuing appointment of attorneys in the Public Defender's Office to misdemeanor cases causes "attorneys in the Public Defender's Office [to] carry caseloads that exceed national criminal justice standards and goals." (Order, February 25, 2009) That finding by the Court is sufficient to trigger the mandatory operation of Rule 13, Section 1(e)(4)(D), Rules of the Supreme Court of Tennessee.**

As noted above, Rule 13, Section 1(e)(4)(D), Rules of the Supreme Court of Tennessee states that a court shall not make an appointment of counsel from the Public Defender's Office if that office "makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards." What are the "professional standards" referenced by the Supreme Court in this Rule? Relevant case law provides the answer.

The Tennessee Supreme Court held more than thirty years ago that, in determining the constitutional competency of legal representation of an accused, "[t]rial courts and defense counsel should look to and be guided by [the American Bar Association's Standards relating to the Administration of Criminal Justice in general,] and specifically to those portions of the Standards which relate to the Defense Function." Baxter v. Rose, 523 S.W.2d 930, 936 (1975); see Testimony of Jamie Poston, Transcript of June 10, 2008 hearing, pp. 81-88.

These ABA Standards for Criminal Justice were published in the 1970s. Dean Norman Lefstein, who testified as an expert witness for the Public Defender's Office at the General Sessions Court hearing, authored portions of those Standards dealing with public defender services. (Affidavit of Norman Lefstein, ¶ 3) Other standards adopted

by the ABA relating to the provision of criminal defense services include *The ABA Ten Principles of a Public Defense Delivery System* (2002). (Id., ¶ 16)

In commentary to Principle No. 5 of *The ABA Ten Principles of a Public Defense Delivery System*, the Standards admonish that the caseload standards established by the National Advisory Commission (NAC) on Criminal Justice Standards and Goals "should in no event be exceeded . . . ." Id. Furthermore, less than two weeks ago the ABA approved a document titled Eight Guidelines of Public Defense Related to Excessive Workloads, in which the ABA reaffirmed its position that the NAC standards are the upper limit for a public defender's caseload. Commentary to Guideline 4 states:

> Consistent with prior ABA policy, these Guidelines do not endorse specific numerical caseload standards, except to reiterate a statement contained in the commentary to existing principles approved by the ABA: "National caseload standards should in no event be exceeded." This statement refers to numerical annual caseload limits published in a 1973 national report [the NAC report].

ABA Eight Guidelines of Public Defense Related to Excessive Workloads, Commentary to Guideline 4, at p. 11 & nn. 29 & 30) (copy attached).

The NAC caseload standards were submitted in evidence to the General Sessions Court at the June 10, 2008, hearing, and contrasted with the much heavier caseloads carried by attorneys in the Public Defender's Office. (Transcript of June 10, 2008 hearing, pp. 41-43 and Ex. 2)

When the General Sessions Court found in its February 25, 2009, Order that "attorneys in the Public Defender's Office carry caseloads that exceed national criminal justice standards and goals," it could only have been referring to the NAC standards, because they were the only numerical caseload standards placed into evidence at the

hearing. As shown above, the NAC standards relate directly to the ABA standards referenced by the Supreme Court of Tennessee in Baxter v. Rose, 523 S.W.2d 930, 936 (1975), and are among the "professional standards" that are the foundation of the Supreme Court's Rule 13.

Unfortunately, the General Sessions Court made no factual findings regarding the qualitative effects of excessive caseloads on the ability of lawyers in the Public Defender's Office to meet professional standards. The Court declined to make such findings despite the overwhelming evidence that the Public Defender presented at the June 2008 hearing regarding his lawyers' inability to perform the tasks necessary to render competent and effective representation because of these caseloads. Nevertheless, by finding that the Public Defender's current caseloads "exceed national criminal justice standards and goals," the General Sessions Court affirmed that the Public Defender had established this fact by clear and convincing evidence.

This finding is supported by uncontroverted proof adduced at the June 10, 2008, hearing. As stated above, the testimony of assistant public defenders in the Knox County Public Defender's office corroborates the General Sessions Court's quantitative finding of excessive caseloads and shows the deleterious effect of those caseloads on the quality of representation that attorneys in the Public Defender's Office are able to provide. Christy Murray, an assistant public defender in the Knox County Office who is assigned to Division II of Knox County Criminal Court, testified, "My caseload since I began in Division II has, frankly, been **unbearable**." (Transcript, June 10, 2008, hearing, at p. 89 (emphasis added)). Ms. Murray further testified that because of her caseload she is not able to represent "most" of her clients in accordance with constitutional standards, the

ABA standards, or the Tennessee Rules of Professional Conduct. (Id. at pp. 91–92) Jamie Poston, then an assistant public defender who was assigned to the Misdemeanor Division of the General Sessions Court, testified that her caseload created conflicts for her among clients and their cases. (Id. at p. 85) When asked whether she was able to render representation that comported with constitutional and professional standards, Ms. Poston testified, ". . . I don't think that I can really say that I'm doing what I should be doing." (Id. at pp. 86–87) While only Ms. Murray and Ms. Poston testified, the General Sessions Court agreed that the testimony of the remaining assistant public defenders would have been similar to that of the these two attorneys. (Id. at pp. 92–93)

The Public Defender also introduced expert testimony at the June 10, 2008, hearing to establish that an excessive caseload renders it impossible for an attorney representing the criminally accused to comply with his or her constitutional, professional, and ethical obligations. For example, Mr. Tom Dillard, a practicing attorney for 43 years, when asked about assistant public defenders' caseloads, stated simply, "I couldn't do it." (Id. at p. 124) Dean Norman Lefstein, whom the General Sessions Court recognized as an expert in indigent criminal defense, testified that the ABA standards and NAC standards are authoritative and that assistant public defenders in the Knox County Office could not comply with their ethical and constitutional obligations, given their caseloads. (Id. at p. 101 et seq.)

The NAC caseload standards and the ABA Standards are both "professional standards," and, in the latter case, are directly relevant to determining the constitutionality of the legal representation provided to an indigent defendant. The General Sessions Court's factual finding means that the Public Defender is not able to

render representation to existing clients, much less additional clients, in accordance with NAC caseload standards, and therefore the "professional standards" referenced by the Supreme Court of Tennessee, both in Rule 13, and in its opinion in Baxter v. Rose, 523 S.W.2d 930, 936 (1975).

Having found as fact that the caseloads of the attorneys at the Public Defender's Office currently exceed NAC professional standards, the General Sessions Court was required by Rule 13 to grant relief and was without legal authority to deny relief to the Public Defender.

3. **By ruling that the Public Defender was not entitled to the relief requested, after finding that caseloads in the Public Defender's Office exceeded professional standards, the General Sessions Court acted in a fundamentally illegal way. The Public Defender is entitled to the relief requested below.**

This Court's role in reviewing the lower court's action pursuant to a Petition for Writ of Certiorari does not allow for any de novo review of the evidence presented at the June 10, 2008, hearing. Relief can be granted if the ruling is in derogation of an applicable Rule of court and, therefore, illegal.

The general rule is that "[the common law writ of certiorari] *cannot be exercised to review the judgment* [of the court below] *as to intrinsic correctness, either on the law or on the facts of the case.*" State v. Johnson, 569 S.W.2d 808, 812 (Tenn. 1978) (quoting State ex rel. McMorrow v. Hunt, 192 S.W. 931, 933 (Tenn. 1917) (emphasis in original). Nevertheless, as the Johnson court noted, "The courts have not hesitated to make exceptions to the general rule." Id. This case falls within one of those exceptions because the lower court's ruling was fundamentally illegal.

In Johnson, Chief Justice Henry stated:

> I have no quarrel with the general rule that the common law writ should be restricted to those cases where an inferior tribunal has exceeded the jurisdiction conferred or is acting illegally and there is no other plain, speedy or adequate remedy. I agree, as a general proposition that it does not normally lie to inquire into the correctness of the judgment where the Court has jurisdiction. I further agree that piecemeal review, as a general rule, is to be shunned.
>
> I am persuaded, however, that there are, and must be, exceptions to the general rule. I will not attempt to catalog them; however, they would include, but not be restricted to, the following:
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> a. Where the ruling of the Court below represents a fundamental illegality. *State ex rel. McMorrow v. Hunt, supra; Medic Ambulance v. McAdams, supra; Whitwell v. State, supra.* [citation omitted]
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> * * *
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> d. Where the action of the trial judge was without legal authority. *State v. Gant, supra.* [citation omitted]
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> * * *
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> In entertaining and acting upon this discretionary writ, in my view, a critical consideration is the existence of an effective, available and expeditious appellate remedy. The mere fact that an appeal may ultimately afford a vehicle for the presentation of the errors asserted may well be of no significance. The right or interest sought to be protected may be eroded or devitalized notwithstanding the successful pursuit of an appeal. Again, the ultimate test must be whether, absent the use of the common law writ, either party to a criminal action loses a right or forfeits an interest that can never be recaptured.

Id. at 815–16 (emphasis added).

Here, the ongoing issue of excessive caseloads creates problems every day in the representation of individual clients. As Dean Lefstein testified, these are, truly, interests

that can never be recaptured. (Testimony of Dean Norman Lefstein, Transcript of June 10, 2008 hearing, p. 101)

In explaining the fundamental illegality exception, the Johnson court relied on its opinion in State v. Odom, 292 S.W.2d 23 (Tenn. 1956). In Odom, the jury had convicted the defendant of first-degree murder, but the judge reduced the conviction to second-degree murder and denied the state's motion for a new trial and its prayer for an appeal. Johnson, 569 S.W.2d at 812–13 (discussing Odom). The state sought review by petitioning for a writ of certiorari from the Tennessee Supreme Court, which it granted. On review, it held that "[the trial court's] action in reducing the degree of unlawful homicide from that found by the jury is *illegal*." Id. at 813 (discussing and quoting Odom, 292 S.W.2d at 25) (emphasis in original). In discussing the nature of the trial court's action in reducing the conviction, the Johnson court stated, "It should be observed that in the literal and conventional sense the trial court had not 'exceeded the jurisdiction conferred' and was not acting 'illegally' in the usual sense of the word. He merely committed a procedural error—an error of law." Id. (emphasis added). The lower court here similarly committed an "error of law" when it failed to properly apply Rule 13.

In State v. Gant, 537 S.W.2d 711 (Tenn. Crim. App. 1975), the Court granted the state's petition for a common law writ of certiorari and on review reversed the trial judge's Order suppressing evidence. Id. at 714. In Gant, there was no dispute that the contraband at issue had been seized during a warrantless search of the defendant's prison cell. The trial judge had excluded the evidence seized. Id. at 712–13. Explaining its basis for issuing the writ and granting relief, the Gant court stated:

> We think it is recognized, that for safety and security purposes, prison officials are authorized to search a prisoner's cell without a warrant for weapons.
>
> We think the learned veteran trial judge was *without legal authority* to suppress the evidence and to hold that the search of the prisoner's cell without a search warrant violated the prisoner's rights under the Fourth Amendment to the United States Constitution.

Id. (emphasis added); see also Johnson, 569 S.W.2d at 815 (listing "[w]here the action of the trial judge was without legal authority" as an exception to the general rule regarding the scope of review under a common law writ of certiorari, and citing Gant).

The AOC in its previous Reply (filed May 13, 2009) argues strongly against any reliance on fundamental illegality as a basis for a Writ of Certiorari, asserting that such a basis for the writ "reaches back to a pair of cases from the late 1970s that articulate an exception to the general rule... and the vast majority of modern cases that have addressed the issue." (AOC's Reply of May 13, 2009, p. 6) The AOC is wrong in this assertion.

In the past seven years alone (as recently as last month), there is substantial case law in Tennessee – including two decisions of the Supreme Court – affirming this exception to the general rule. First enunciated by the Tennessee courts in the 1970s, this exception was reconfirmed by the Tennessee Supreme Court in 2002 and 2005, and has been invoked in numerous decisions since 2000. The appellate courts often find such writs appropriate in situations where there is a claim that the lower court acted "without legal foundation," or in a fundamentally illegal manner.

Therefore, as an exception to the general rule regarding common law writs of certiorari, if "the trial court acted without legal authority" and there is "no other plain, speedy, or adequate remedy," a superior court can entertain a writ of certiorari from the

decision of an inferior court. State v. Adler, 92 S.W.3d 397, 401 (Tenn. 2002). A few of the cases that enunciate and/or use some variation of the fundamental illegality rationale, which the Attorney General erroneously labels as outdated, are summarized below:

1) State v. Adler, 92 S.W.3d 397 (Tenn. 2002)

This is a 2002 Tennessee Supreme Court case in which the court recognizes the fundamental illegality exception, stating "we have previously noted that an appellate court is within its province to grant a writ of certiorari 'where the action of the trial court is without legal authority.'" Adler, 92 S.W.3d 401 citing State v. Gant, 537 S.W.2d 711 (Tenn.Crim. App. 1975). In Adler, the appeal involved "an allegation that the trial court acted without legal authority and there is no other plain, speedy, or adequate remedy," and that court ruled that it would treat the appellant's petition as a writ of certiorari. Adler affirmed that the line of cases from the 1970s adopting the fundamental illegality exception remain applicable.

2) Moody v. State, 160 S.W.3d 512 (Tenn. 2005)

In this 2005 Tennessee Supreme Court case, the court stated that "generally, the writ of certiorari is limited in application" but that "the writ properly applies, however, when the action of the trial court is without legal authority" and where no other "plain, speedy or adequate remedy" is available. Moody, 160 S.W.3d at 515 citing Adler, 92 S.W.3d at 401; Tenn. Code Ann. §27-8-101(2000). In Moody, the court denied the petition for a common law writ of certiorari because the proper procedure for appealing an illegal sentence, which was at issue in this case, was with a writ of habeas corpus. The court found the fundamental illegality exception valid but inapplicable because the proper method of appeal was by seeking a writ of habeas corpus.

3) State v. Smith, 278 S.W.3d 325 (Tenn. Crim. App. 2008)

In Smith, the Tennessee Court of Criminal Appeals followed the Moody and Adler rulings and stated that "Our Supreme Court has said...that an appellate court is within its province to grant a writ of certiorari where the action of the trial court is without legal authority." Smith, 278 S.W.3d 331. The court summarized: "Thus, the writ of certiorari may be utilized to review an action when the lower court acted without legal authority" as long as there is also no other plain, speedy or adequate remedy as per Tennessee Code §27-8-101. Id. The petition for a writ was denied because the petitioner had the opportunity to appeal, which "would have afforded the petitioner a plain, speedy, and adequate remedy." Id. at 332.

4) State v. Gifford, 2008 Tenn. Crim. App. LEXIS 305, * (Tenn. Crim. App. 2008)

In Gifford, as in the instant case, the State argued that the petition for writ of certiorari was not proper "because the trial court did not exceed its jurisdiction or otherwise act illegally," claiming that only the general rule should apply. The court rejected the State's position, concluding that the "writ is proper because the record reveals that the issue presented involves an allegation that the trial court acted without legal authority...and there is no other plain, speedy or adequate remedy." Gifford, 2008 Tenn. Crim. App. LEXIS 305, *7. Due to the allegation of a lack of legal authority for the lower court's ruling, this court decided to "treat the Appellant's petition as a writ of certiorari."

5) State v. Hanners, 2007 Tenn. Crim. App. LEXIS 389, * (Tenn. Crim. App. 2007)

In Hanners, the court again recognized the general rule regarding writs of certiorari but again emphasized the exception which applies when a trial court acts, as in the instant case, "without legal authority" and no other adequate remedy exists. Hanners, 2007 Tenn. Crim. App. LEXIS 289, *5 citing Adler, 92 S.W.3d at 401. At issue was the refusal of a lower court to change the wording of the judgment form. The court in Hanners refused the Appellant's petition for writ of certiorari because the lower court "was acting within legal authority in denying" that motion. The writ was rejected not because the fundamental illegality exception was outdated, but because it did not apply.

6) Drumbarger v. State, 2005 Tenn. Crim. App. LEXIS 793, * (Tenn. Crim. App. 2005)

In Drumbarger, the court recognized that the common law writ of certiorari applies "when the trial court is without legal authority." Drumbarger, 2005 Tenn. Crim. App. LEXIS 793, *7. However, the court ruled that the petitioner's claim wasn't cognizable as a petition for such a writ, because "the petitioner does not allege that the trial court was without legal authority but, rather, seeks retroactive application of case law issued four years after his conviction." Id. As the court concluded, "the writ of certiorari cannot be used for such a purpose." Id.

7) State v. Parker, 2005 Tenn. Crim. App. LEXIS 345, * (Tenn. Crim. App. 2005)

The court in Parker noted that "the writ of certiorari may not be used to inquire into the correctness of a judgment issued by a court with jurisdiction," Parker, 2005 Tenn. Crim. App. LEXIS 345, *9, adding "however, the writ applies when the trial court is without legal authority." Id. citing Moody, 160

S.W.3d 512. The petition was denied because it was filed outside the applicable statute of limitations.

8) **Scates v. State, 2005 Tenn. Crim. App. LEXIS 49, * (Tenn. Crim. App. 2005)**

The court in Scates endorsed the general rule applied to the writ of certiorari and as recognized the exception when "the trial court's action is without legal authority." Scates, 2005 Tenn. Crim. App. LEXIS 49, *8 citing Adler, 92 S.W.3d at 401. Because the case before the court involved an "allegation that the trial court acted without legal authority in denying the petition," and there was no other adequate remedy, the court to "treat the appellant's petition as a writ of certiorari" and inquire into the correctness of the lower court's decision. Id.

9) **Tutt v. State, 2004 Tenn. Crim. App. LEXIS 784, * (Tenn. Crim. App. 2004)**

In Tutt, having recognized both the general rule of writs of certiorari and the exception, citing Adler, the court ruled that the complaint should not proceed as a petition for a writ of certiorari because the court "was not aware that a trial court acts illegally or without legal authority when it places the matter on the retired docket." Tutt, 2004 Tenn. Crim. App. LEXIS 784, *6. The exception was not applicable because the claim was not of a fundamentally illegal act by the lower court.

10) **Ritchie v. State, 2003 Tenn. Crim. App. LEXIS 708, * (Tenn. Crim. App. 2003)**

In Ritchie, the appellant argued that the "trial court erred in denying his petition for writ of certiorari under Tennessee Code." Ritchie, 2003 Tenn. Crim. Appl. LEXIS 708, *17. The court recognized the fundamental illegality exception holding that such a writ may be granted "where an inferior tribunal has ... acted illegally." The court dismissed the claims because "a writ of certiorari may not be invoked to secure a court's review of its own judgments." Id. at 18.

11) **Robinson v. Corder, 140 S.W.3d 304 (Tenn. Ct. App. 2003)**

The Tennessee Court of Appeals stated that "the writ of certiorari may be granted whenever authorized by law," acknowledging the general rule, "and also where an inferior tribunal, ... exercising judicial functions ... is acting illegally," and there is not another adequate remedy. The court agreed with the petitioner that the trial court was without legal authority to deny Corder's request for expungement based on the statute, just as in the instant case the lower court was without legal authority to deny the Public Defender's

requested remedy based on Rule 13 when it found that there was a violation of professional standards.

Less than a month ago the Court of Appeals again reviewed the procedural requirements for a Writ of Certiorari, in Brown v. Little, No. M2008-02644-COA-R3-CV (Tenn. Ct. App. 2009), copy attached. The first step is to request the lower court, here the General Sessions Court, to send the record made below to this Court for review. In the instant case, that action was taken by Fiat on March 10, 2009.

The next step is judicial review of the lower court's decision. Because the lower court's ruling in the instant case is not final and appealable (Order of June 25, 2009), review by this Court is the only avenue for relief open to the Public Defender.

The Brown court also reaffirms the illegality standard set out by the Supreme Court in Johnson, supra. Brown, supra, at pp. 3, 4.

In light of the foregoing cases, it is clear that the fundamental illegality exception to the general rule regarding the common law writ of certiorari remains good law. Contrary to the assertion of the AOC, the vast majority of recent cases are not at odds with the Public Defender's contention that a writ of certiorari is appropriate to review the decision of a lower court when it acted without legal foundation, and when there is no other remedy available.

There is no other remedy available, because the lower court order is not final. The decision of the lower court is without legal foundation because once there is a finding of a violation of professional standards, application of Rule 13 is mandatory, and no further appointments may be made.

As stated in the Petition, the action of the General Sessions Court in this case was "contrary to law." Having found that additional misdemeanor appointments caused

representation in the Public Defender's Office to not be in accord with the professional standards established as a benchmark by the Supreme Court of Tennessee, the General Sessions Court was required to grant the relief requested. Because the General Sessions Court did not grant that relief, its Order is fundamentally "illegal."

4. **The AOC misinterprets Rule 13. An unconstitutional level of representation is never acceptable.**

In its earlier Reply (filed May 18, 2009), the AOC advances the argument that in order to avoid further appointments under Rule 13 a "lawyer must show that his appointment runs afoul of not only professional standards, but also constitutional standards." AOC's Reply of May 18, 2009, at p. 9. The AOC's argument, taken to its logical conclusion, is that an attorney could make a clear and convincing showing that adding additional appointments to her current caseload "would prevent counsel from rendering effective representation in accordance with constitutional... standards" but she would still be required to accept appointments because she had not made a concurrent showing that she would be able to meet "professional standards."

This interpretation of Rule 13 is absurd. The AOC would require an attorney to continue to represent indigent clients in a manner that did not meet constitutional standards for legal representation unless and until that attorney could demonstrate, by clear and convincing evidence, that her work also fell below applicable professional standards.

Nonetheless, the AOC argues that because "the Public Defender failed to prove that further appointments to his caseload would [also] prevent him from providing representation meeting constitutional standards," the petition must be denied. Id. The

AOC's reasoning nullifies the intent of the Supreme Court in adopting Rule 13 and is illogical.

Applicable principles of statutory construction do not support the AOC's questionable reading of Rule 13. Because Rule 13 plainly requires that an attorney meet both constitutional and professional standards with respect to her representation in appointed cases, an attorney cannot be appointed to additional cases if she makes the requisite showing that adding appointments to her workload would prevent her from meeting one of these criteria.

With respect to statutes, although courts "generally presume that the General Assembly [of Tennessee] purposefully chooses the words used in statutory language," courts may not so presume when a presumption would lead to a result that is "difficult to conceive that the legislature intended." State v. Stewart, 33 S.W. 3d 7-85, 7-92 (Tenn. 2000). An interpretation is inappropriate when it would "produce results contrary to those intended ...." Leab v. S&H Mining Co., 76 S.W.3d 344, 350 (Tenn.2002). In Leab, where two elements were present in a statute, the court found that the "legislative purpose behind the statute is best served by an interpretation which requires proof of only one, and not both, of the individual elements...." Id. In the instant case, the Supreme Court cannot have intended to foster the continuation of representation that does not rise to a constitutional level of proficiency, and its purpose in drafting Rule 13 is, as the Leab court held, "best served by an interpretation which requires proof of only one, and not both, of the individual elements." Clear and convincing evidence that representation will fall below either professional or constitutional standards is sufficient to trigger Rule 13's mandatory provisions.

There is no legislative history regarding Supreme Court Rule 13 that allows the Public Defender conclusively to show that the Court's intent in crafting Rule 13 was to provide that clear and convincing proof of representation that falls below either constitutional or professional standards is sufficient to trigger the Rule. Nevertheless, the AOC's proposed reading would produce an absurd result, because it would mean that a court-appointed attorney under Rule 13 could provide service that met "professional" standards, but was nonetheless unconstitutional, and yet would still be forced to take on appointments. It is difficult, if not impossible, to conceive that our state Supreme Court intended that Rule 13 be susceptible to such an interpretation.

Conclusion

The Supreme Court intends that indigent defendants receive competent legal representation. The representation must meet constitutional and ethical standards. The Court established clear criteria by which such representation could be measured. The caseloads handled by attorneys in the Public Defender's Office far exceed professional standards. The General Sessions Court recognized that. Nonetheless, that Court failed to grant the relief required by Rule 13. If a criminal court judge had made the same decision, the Public Defender would be able to file a Rule 10 appeal. Because Supreme Court Rule 13 is mandatory, there must be some method for enforcement. In this case, the Writ is the only method available.

The AOC is incorrect in labeling the fundamental illegality basis for the Writ an outdated theory with which modern cases take issue. Further, the AOC advances an illogical position when it argues that the representation of appointed counsel must both be

unconstitutional and violate professional standards before relief from heavy caseloads can be ordered under Rule 13.

Respectfully, this Court, acting upon the pending Petition, should, on review, grant the relief requested Writ of Certiorari, and grant the relief required by the Tennessee Supreme Court. Misdemeanor appointments to the Public Defender's Office must be stopped until the situation can be remedied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing pleading upon the following individual(s) via hand-delivery or United States Mail, postage prepaid, and correctly addressed as follows:

Douglas Earl Dimond
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Office of the Attorney General
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This 12 day of August, 2009.

T. Maxfield Bahner
Hugh J. Moore, Jr.
D. Aaron Love

AMERICAN BAR ASSOCIATION

EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS

August 2009

This document contains the ABA "Eight Guidelines of Public Defense Related to Excessive Workloads." The Eight Guidelines and their commentary were approved by the ABA House of Delegates as official policy of the Association during the ABA Annual Meeting in Chicago on August 3, 2009.

Beginning at page 22, there is a Report about the Eight Guidelines that was submitted to the House of Delegates by the ABA Standing Committee on Legal Aid and Indigent Defendants, which was the ABA entity that developed the Eight Guidelines and proposed their adoption. The Report was not submitted to the House of Delegates for approval and does not constitute ABA policy.

A printed version of the Guidelines will be available within the next several months.

Introduction

The American Bar Association (ABA) has declared the achievement of quality representation as the objective for those who furnish defense services for persons charged in criminal and juvenile delinquency cases who cannot afford a lawyer. This goal is not achievable, however, when the lawyers providing the defense representation have too many cases, which frequently occurs throughout the United States. This was emphasized in the report of the ABA Standing Committee on Legal Aid and Indigent Defendants published in 2004, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, available at www.indigentdefense.org. Additionally, in 2009, two national studies concerned with indigent defense documented the enormous caseloads of many of the lawyers who provide representation of the indigent and the crucial importance of addressing the problem.[1]

In 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued its first ever ethics opinion concerning the obligations of lawyers, burdened with excessive caseloads, who provide indigent defense representation.[2] The opinion made clear that there are "no exceptions" for lawyers who represent indigent clients, i.e., *all* lawyers have a duty to furnish "competent" and "diligent" service, as required by rules of professional conduct.[3]

Although Formal Opinion 06-441 set forth *some* of the steps that those providing defense services should take when faced with excessive caseloads, neither the ethics opinion nor ABA Standards for Criminal Justice contain the kind of detailed action plan, set forth in these Guidelines, to which those providing public defense should adhere as they seek to comply with their professional responsibilities. Thus, Guideline 1 urges the management of public defense

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[1] *See* Report of the National Right to Counsel Committee, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (The Constitution Project 2009)[hereinafter JUSTICE DENIED), *available at* www.tcpjusticedenied.org; MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (National Association of Criminal Defense Lawyers (2009) [hereinafter MINOR CRIMES], *available at* www.nacdl.org/misdemeanor.

[2] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006)[hereinafter ABA Formal Op. 06-441].

[3] ABA MODEL RULES OF PROF'L CONDUCT R. 1.1, R. 1.3 (2008) [hereinafter ABA MODEL RULES].

programs to assess whether excessive workloads are preventing their lawyers from fulfilling performance obligations; and Guidelines 2, 3, and 4 relate to the need for continuous supervision and monitoring of workloads, training of lawyers respecting their ethical duty when confronted with excessive workloads, and the need for management to determine if excessive workloads exist. Guidelines 5 through 8 address the range of options that public defense providers and their lawyers should consider when excessive workloads are present. As set forth in Guideline 6, depending upon the circumstances, it may be necessary for those providing public defense to seek redress in the courts, but other choices may be available, as suggested in Guideline 5, before this step is required.

These Guidelines are intended for the use of public defense programs and for lawyers who provide the representation, when they are confronted with too many persons to represent and are thus prevented from discharging their responsibilities under professional conduct rules. In addition, because these Guidelines contain important considerations for those responsible for indigent defense services, they should be valuable to a number of other audiences, including members of boards and commissions that oversee public defense representation, policymakers responsible for funding indigent defense, and judges who are called upon to address the caseload concerns of those who provide public defense services. Since these Guidelines relate directly to the fair, impartial, and effective administration of justice in our courts, they also should be of special interest to bar leaders, as well as to the legal profession and to the public.

Guidelines and Comments

1. **The Public Defense Provider avoids excessive lawyer workloads and the adverse impact that such workloads have on providing quality legal representation to all clients. In determining whether these objectives are being achieved, the Provider considers whether the performance obligations of lawyers who represent indigent clients are being fulfilled, such as:**

    - **whether sufficient time is devoted to interviewing and counseling clients;**
    - **whether prompt interviews are conducted of detained clients and of those who are released from custody;**
    - **whether pretrial release of incarcerated clients is sought;**
    - **whether representation is continuously provided by the same lawyer from initial court appearance through trial, sentencing, or dismissal;**
    - **whether necessary investigations are conducted;**
    - **whether formal and informal discovery from the prosecution is pursued;**
    - **whether sufficient legal research is undertaken;**
    - **whether sufficient preparations are made for pretrial hearings and trials; and**
    - **whether sufficient preparations are made for hearings at which clients are sentenced.**

Comment

These Guidelines use "Public Defense Provider" or "Provider" to refer to public defender agencies and to programs that furnish assigned lawyers and contract lawyers. The words "lawyer" and "lawyers" refer to members of the bar employed by a defender agency, and those in private practice who accept appointments to cases for a fee or provide defense representation pursuant to contracts. The ABA long ago recognized the importance of indigent defense systems including "the active and substantial participation of the private bar…" provided "through a coordinated assigned-counsel system" and also perhaps including "contracts for services."[4] In addition to covering all providers of defense services, these Guidelines are intended to apply both to adult and juvenile public defense systems. The objective of furnishing "quality legal representation" is American Bar Association policy

[4] ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Std. 5-1.2(b) (3rd ed. 1992)[hereinafter ABA PROVIDING DEFENSE SERVICES].

related to indigent defense services.[5] This goal is consistent with the ABA's Model Rules of Professional Conduct, which require that "competent representation" be provided consisting of "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6] However, if workloads are excessive, neither competent nor quality representation is possible. As stated in the ABA's Model Rules, "[a] lawyer's workload must be controlled so that each matter can be handled competently."[7] In addition, it has been successfully argued that an excessive number of cases create a concurrent conflict of interest, as a lawyer is forced to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services.[8] The responsibilities of defense lawyers are contained in performance standards[9] and in professional responsibility rules governing the conduct of lawyers in all cases.[10]

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[5] "The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter." ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-1.1 See also ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (2002)[hereinafter ABA TEN PRINCIPLES ("Defense counsel's workload is controlled to permit the rendering of quality representation.").

[6] ABA MODEL RULES, *supra* note 3, R. 1.1.

[7] *Id.* at R. 1.3, cmt. 2.

[8] "When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created." In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 1130, 1135 (Fla. 1990). *See also* American Council of Chief Defenders, National Legal Aid and Defender Association, Ethics Opinion 03-01, at 4 (2003): "The duty to decline excess cases is based both on the prohibition against accepting cases which cannot be handled 'competently, promptly to completion' ... and the conflict-of-interest based requirement that a lawyer is prohibited from representing a client 'if the representation of that client may be materially limited by the lawyer's responsibility to another client.'" (citations omitted). A portion of the language last quoted is from ABA MODEL RULE R. 1.7 (a)(2).

[9] The most comprehensive and authoritative standards respecting the obligations of defense lawyers in criminal cases have been developed by the National Legal Aid and Defender Association. *See* PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (4th Printing)(National Legal Aid and Defender Ass'n 2006). Important defense obligations also are contained in ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION STANDARDS)(3rd ed. 1993)[hereinafter ABA DEFENSE FUNCTION].

[10] *See, e.g.*, ABA MODEL RULES, *supra* note 3, R 1.4, dealing with the obligation of lawyers to promptly and reasonably communicate with the client.

When defense lawyers fail to discharge the kinds of fundamental obligations contained in this Guideline, it is frequently because they have excessive workloads. For example, the failure of lawyers to interview clients thoroughly soon after representation begins and in advance of court proceedings, as necessary, is often due to excessive workloads.[11] When Public Defense Providers rely upon "horizontal" systems of representation, in which multiple lawyers represent the client at different stages of a case, and lawyers often stand in for one another at court proceedings, it is usually because there are too many cases for which the Provider is responsible.[12] If written motions are not filed, legal research not conducted, and legal memoranda not filed with the court, the lawyers most likely have an excessive workload. Similarly, excessive workloads may be the reason that crime scenes are not visited in cases where it might be useful to do so. Besides the performance obligations listed in Guideline 1, there are other indicia of excessive workloads, such as a lack of time for lawyers to participate in defense training programs, the need for which is addressed in Guideline 3 and the accompanying commentary.

2. **The Public Defense Provider has a supervision program that continuously monitors the workloads of its lawyers to assure that all essential tasks on behalf of clients, such as those specified in Guideline 1, are performed.**

Comment

This Guideline is derived from the ABA Ten Principles of a Public Defense Delivery System and emphasizes the critical relationship between supervision and workloads. The ABA Ten Principles require that "workload[s]...[be] controlled" and that lawyers be "supervised and systematically reviewed for quality and efficiency according to nationally and locally

[11] "As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused." ABA DEFENSE FUNCTION, *supra* note 9, Std. 4-3.2 (a). *See also* ABA TEN PRINCIPLES, *supra* note 5, Principle 4: "Defense Counsel is provided sufficient time and confidential space within which to meet with the client."

[12] "Counsel initially provided should continue to represent the defendant throughout the trial court proceedings...." ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-6.2. *See also* ABA TEN PRINCIPLES, *supra* note 5, Principle 7: "The same attorney continuously represents the client until completion of the case." These ABA policy statements do not preclude one or more lawyers with special expertise providing assistance to the lawyer originally assigned to provide representation, and such practices do not necessarily reflect excessive defense workloads.

adopted standards."[13] "Workload," as explained in the ABA Ten Principles, refers to "caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties."[14] The need for such oversight is just as important in programs that use assigned lawyers and contract lawyers as it is in public defender offices. When lawyers have a private practice in addition to their indigent defense representation, the extent of their private practice also must be considered in determining whether their workload is reasonable.[15] This applies to part-time public defenders, assigned lawyers, and contract lawyers.

The ABA endorses complete independence of the defense function, in which the judiciary is neither involved in the selection of counsel nor in their supervision.[16] This call for independence applies to public defender programs, as well as to indigent defense programs that furnish private assigned counsel[17] and legal representation through contracts.[18] Accordingly, the supervision called for under this Guideline is to be provided by seasoned lawyers who are experienced indigent defense practitioners and who act within a management structure that is independent of the judicial, executive and legislative branches of government.

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[13] ABA TEN PRINCIPLES, *supra* note 5, at Principles 5 and 10.

[14] *Id.* at Commentary to Principle 5.

[15] The Massachusetts Committee on Public Counsel Services makes extensive use of private lawyers and seeks to monitor the quality of representation they provide. *See* JUSTICE DENIED, *supra* note 1, at 194, n. 52. However, there are few public defense programs that monitor the *private* caseloads of assigned lawyers or contract lawyers to determine whether these caseloads might interfere with the provision of quality legal representation. *But see* Wash Rev. Code § 10.1-01.050 (2008): "Each individual or organization that contracts to perform public defense services for a county or city shall report...hours billed for nonpublic defense legal services in the previous calendar year, including number and types of private cases."

[16] *See infra* note 54, which contains language from ABA PROVIDING DEFENSE SERVICES, *supra* note 4, dealing with the independence of the defense function.

[17] *See also* ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-2.1.

[18] *See id.* at Std. 5-3.2 (b).

Unless there is supervision of lawyer performance at regular intervals, reasonable workloads and quality representation are not likely to be achieved. Although variations in approach may be called for depending on the kinds of cases represented by the lawyer (e.g., misdemeanor, felony, juvenile, capital, appellate, post-conviction cases) and the lawyer's level of experience, supervision normally requires (1) that meetings be held between an experienced lawyer supervisor and the lawyer being supervised; (2) that the work on cases represented by the supervisee be thoroughly reviewed through case reviews, mock presentations or other thorough reviews; (3) that the lawyer supervisor reviews selected files of the supervisee; (4) that selected court documents prepared by the supervisee be reviewed; (5) that periodic court observations of the supervisee's representation of clients be conducted; and (6) that the number of cases represented by the supervisee, as well as their complexity and likely time commitments, be carefully assessed. In overseeing the work of those providing public defense services, it is important that supervisors have access to data through a management information system, which shows the lawyer's current caseload, the status of cases represented by the lawyer, and other important relevant data.[19]

3. **The Public Defense Provider trains its lawyers in the professional and ethical responsibilities of representing clients, including the duty of lawyers to inform appropriate persons within the Public Defense Provider program when they believe their workload is unreasonable.**

Comment

The requirement of training for lawyers who provide public defense representation is well established ABA policy.[20] This Guideline emphasizes a particular subject area in which Public Defense Providers have an obligation to provide training. Lawyers who provide

[19] The National Right to Counsel Committee recommends that systems of indigent defense establish "[u]niform definitions of a case and a continuous uniform case reporting system...for all criminal and juvenile cases. This system should provide continuous data that accurately contains the number of new appointments by case type, the number of new dispositions by case type, and the number of pending cases." JUSTICE DENIED, *supra* note 1, Recommendation 11, at 199. *See also* La. Rev. Stat. Ann. § 15-148 (B)(1) Supp. 2009), which requires the state's public defender agency to establish a uniform case reporting system, including data pertaining to workload.

[20] See ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-1.5; ABA TEN PRINCIPLES, *supra* note 5, Principles 6 and 9.

defense services need to be aware of their ethical responsibilities to provide "competent" and "diligent" representation, as required by rules of professional conduct,[21] as well as performance standards that will enable them to fulfill those duties. In addition, lawyers should be instructed that they have a responsibility to inform appropriate supervisors and/or managers within the Provider program when they believe their workload is preventing or soon will prevent them from complying with professional conduct rules.[22] This is especially important because there is an understandable reluctance of public defense lawyers to report to those in charge that they either are not, or may not, be providing services consistent with their ethical duties and performance standards. Despite such reluctance, defense lawyers need to make regular personal assessments of their workload to determine whether it is reasonable, whether they are performing the tasks necessary in order to be competent and diligent on behalf of their clients, and whether they need to communicate concerns about their workload to their supervisor. In discussing the ABA Model Rules and their application to excessive public defense caseloads, the ABA Standing Committee on Ethics and Professional Responsibility has explained that lawyers have a duty to inform their supervisors, the heads of defense programs, and, if applicable, the governing board of the Provider when lawyers believe that they have an excessive number of cases.[23] Conversely, it is important that Providers not take retaliatory action against lawyers who, in good faith, express concerns about their workloads.

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[21] *See* ABA MODEL RULES, *supra* note 3, R 1.1., 1.3.

[22] The ABA Model Rules contemplate that issues respecting the discharge of professional duties will be brought to the attention of supervisors: "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional responsibility." ABA MODEL RULES, *supra* note 3, R. 5.2 (b). See also ABA Formal Op. 06-441, *supra* note 2, at 5-6.

[23] "If the supervisor fails to provide appropriate assistance or relief, the lawyer should continue to advance up the chain of command within the office until relief is obtained or the lawyer has reached and requested assistance or relief from the head of the public defender's office.... Such further action might include: if relief is not obtained from the head of the public defender's office, appealing to the governing board, if any, of the public defender's office...." ABA Formal Op 06-441, *supra* note 2, at 6.

4. **Persons in Public Defense Provider programs who have management responsibilities determine, either on their own initiative or in response to workload concerns expressed by their lawyers, whether excessive lawyer workloads are present.**

Comment

Public Defense Providers should learn of excessive workloads when lawyers who provide defense services communicate their concerns to management or from the system for monitoring workloads used by the Provider.[24] Clearly, management should take seriously concerns about case overload expressed by lawyers since those providing client representation are best able to appreciate the daily pressures of their workload yet may be reluctant to complain. Regardless of the source of concerns, it is incumbent upon management to determine whether the volume of cases, perhaps in combination with other responsibilities, is preventing lawyers from providing "competent" and "diligent" representation and a failure to discharge their responsibilities under applicable performance standards.[25] Depending upon the circumstances, supervisors of lawyers and heads of Provider programs are accountable under professional conduct rules when violations of ethical duties are committed by subordinate lawyers for whom they are responsible.[26]

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[24] Client complaints may also be an indication that representation is inadequate due to excessive workloads. *See, e.g.*, NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES: REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 405 (1976).

[25] "As an essential first step, the supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate. This involves consideration of the type and complexity of cases being handled by each lawyer; the experience and ability of each lawyer; the resources available to support her; and any non-representational responsibilities assigned to the subordinate lawyers." ABA Formal Op 06-441, *supra* note 2, at 7. A supervisor's assessment of the workloads of subordinate lawyers will be significantly aided if an adequate management information system is established, as noted in the Comment to Guideline 2 *supra*. As recognized in the ABA's ethics opinion, the extent of support staff (e.g., investigators, social workers, and paralegals) to assist lawyers impacts the number of persons that a lawyer can represent. When adequate support personnel are lacking or if they have excessive caseloads, it is important for the Provider to seek additional personnel.

[26] "A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." ABA MODEL RULES, *supra* note 3, R. 5.1 (c). "Firm" or "law firm" denotes...lawyers employed in a legal services organization or the legal department of a corporation or other organization." *Id.* at R. 1.0 Terminology.

However, when a lawyer and supervisor disagree about whether the lawyer's workload is excessive, the decision of the supervisor is controlling if it is a "reasonable resolution of an arguable question of professional duty."[27] Where the resolution of the supervisor is not reasonable, the lawyer must take further action.[28]

Consistent with prior ABA policy, these Guidelines do not endorse specific numerical caseload standards, except to reiterate a statement contained in the commentary to existing principles approved by the ABA: "National caseload standards should in no event be exceeded."[29] This statement refers to numerical annual caseload limits published in a 1973 national report.[30] As noted by the ABA Standing Committee on Ethics and Professional Responsibility, while these standards "may be considered, they are not the sole factor in determining whether a workload is excessive. Such a determination depends not only the number of cases, but also on such factors as case complexity, the availability of support

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Responsibility for lawyer conduct may also extend to lawyer members of governing boards of Public Defense Providers.

[27] *See* ABA MODEL RULES, *supra* note 3, R. 5.2 (b), quoted in note 22 *supra*.

[28] This includes the possibility of filing motions to withdraw from a sufficient number of cases to permit representation to be provided consistent with professional conduct rules. *See* ABA Formal Op 06-441, *supra* note 2, at 6, and language quoted *supra* in note 20.

[29] ABA TEN PRINCIPLES, *supra* note 5, Commentary to Principle 5, at 2.

[30] "In its report on the Courts, the Commission [National Advisory Commission on Criminal Justice Standards and Goals] recommended the following maximum annual caseloads for a public defender office, i.e., on average, the lawyers in the office should not exceed, per year, more than 150 felonies; 400 misdemeanors; 200 juvenile court cases; 200 mental health cases; or 25 appeals." JUSTICE DENIED, *supra* note 1, at 66. As noted in JUSTICE DENIED, these caseload numbers are 35 years old, the numbers were never "empirically based," and were intended "for a public defender's office, not necessarily for each individual attorney in that office." *Id.* In fact, the Commission warned of the "dangers of proposing any national guidelines." *Id.* The American Council of Chief Defenders, a unit of the National Legal Aid and Defender Association comprised of the heads of defender programs in the United States, also has urged that the caseload numbers contained in the 1973 Commission report not be exceeded. *See American Council of Chief Defenders Statement on Caseloads and Workloads*, August 24, 2007. Some state and local governments have set limits on the number of cases that defense lawyers can handle on an annual basis. *See infra* note 37.

services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties."[31] Thus, while the ABA has not endorsed specific caseload numbers, except to the limited extent discussed above, the routine failure to fulfill performance obligations like those listed in Guideline 1, usually indicates that lawyers have excessive workloads.

5. **Public Defense Providers consider taking prompt actions such as the following to avoid workloads that either are or are about to become excessive:**

   - **Providing additional resources to assist the affected lawyers;**
   - **Curtailing new case assignments to the affected lawyers;**
   - **Reassigning cases to different lawyers within the defense program, with court approval, if necessary;**
   - **Arranging for some cases to be assigned to private lawyers in return for reasonable compensation for their services;**
   - **Urging prosecutors not to initiate criminal prosecutions when civil remedies are adequate to address conduct and public safety does not require prosecution;**
   - **Seeking emergency resources to deal with excessive workloads or exemptions from funding reductions;**
   - **Negotiating formal and informal arrangements with courts or other appointing authorities respecting case assignments; and**
   - **Notifying courts or other appointing authorities that the Provider is unavailable to accept additional appointments.**

Comment

Some of the most important ways in which a Provider may be able to reduce excessive lawyer workloads are listed in this Guideline. When workloads have been determined to be excessive, the steps suggested will be appropriate to pursue if they can be quickly achieved. However, if the steps will take a good deal of time to achieve, they will likely be appropriate to pursue *only in advance* of the time that workloads actually have become excessive. In other words, once workloads are determined to be excessive, a Provider must be able to achieve immediate relief; when this is not possible, the Provider must seek relief as set forth in Guideline 6.

[31] ABA Formal Op 06-441, *supra* note 2, at 4.

This Guideline is based on the assumption that judges are appointing either the Public Defense Provider or its lawyers to the cases of indigent clients. In jurisdictions in which the Provider is not appointed by judges or court representatives, but instead clients are simply referred to the defense program, the Provider is required to decline representation if acceptance would result in a violation of the rules of professional conduct.[32] Providers who continue to accept cases when an excessive workload is present will fail to provide competent and diligent services as required under rules of professional conduct, have an arguable conflict of interest because of the multiple clients competing for their time and attention,[33] and may be unable to fulfill their duties under the Sixth Amendment.[34]

In the more usual situation in which courts assign cases to the Public Defense Provider, the cooperation of courts may be necessary in order to implement some of the alternatives suggested in this Guideline. One of the most straightforward ways to address excessive lawyer workloads is for the Provider and judges or other officials to negotiate informal arrangements to suspend or reduce new court assignments, with the understanding that additional cases will be represented by assigned counsel, contract lawyers, or other Provider program. This may not be a feasible alternative, however, if funds are not available to compensate the lawyers.[35] It may also be possible to persuade a court to order, or for the funding authority to authorize, that additional resources be provided due either to the complexity of certain types of cases or to one or two particularly time-

[32] "Except as stated in paragraph (c) [where a court orders counsel to proceed with representation], a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law." ABA MODEL RULES, *supra* note 3, R. 1.16 (a)(1).

[33] *See supra* note 8 and accompanying text.

[34] *See* discussion of litigation in JUSTICE DENIED, *supra* note 1, at 110-128.

[35] "[A]ttorneys in several states have successfully argued that a state's refusal to provide adequate compensation amounts to a taking of property under federal or state constitutions, and just compensation must therefore be paid. There appear to be no recent decisions of state appellate courts requiring that lawyers provide pro bono service in indigent criminal and juvenile cases." JUSTICE DENIED, *supra* note 1, at 104-05. The ABA has recognized that "[g]overnment has the responsibility to fund the full cost of quality legal representation for all eligible persons...." ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-1.6.

consuming cases.[36] Further, it may be possible to arrange through either contract or legislation a limit on the number and types of cases annually assigned to lawyers.[37]

In some jurisdictions where courts appoint counsel, it may nevertheless be possible for the Provider simply to notify judges or other officials that lawyers from the defense program are unavailable to accept appointments in all or certain categories of cases for a specified period of time or until further notice. A declaration of "unavailability" has sometimes been used successfully, such as in some counties in California. This approach is seemingly based on the implicit premise that governments, which establish and fund providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules. On the other hand, some Providers may conclude that this approach is either not contemplated by the jurisdiction's statutes[38] or is otherwise deemed inappropriate.

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[36] For example, pursuant to a motion of The Defender Association in Seattle, Washington, a trial court ordered increased "attorney fees and paralegal fees and investigation fees to the levels requested...[as] necessary to provide effective assistance of counsel." *See* In the Detention of Kevin Ambers, et al., Superior Court of Washington for King County, Order Granting Respondent's Motion for Increased Payment for Respondent's Counsel on above Consolidated Cases, January 20, 2006, *available at* http://www.defender.org/files/archive/judgelauorderjan202006.pdf.

[37] The New Hampshire Public Defender, a nonprofit organization that provides defense services, enters into a contract with the state's Judicial Council that contains caseload limitations and requires the defender program to notify the courts if caseloads are too high so that private lawyers can be appointed. See JUSTICE DENIED, *supra* note 1, at 168. In Seattle, the City Council has enacted an ordinance that imposes a ceiling on the number of cases to which lawyers may be assigned annually. The ordinance can be accessed on the website of The Defender Association serving Seattle and King County, Washington. *See* http://www.defender.org/node/18. In Massachusetts, legislation authorizes the Committee on Public Counsel Services to establish "standards" that contain "caseload limitation levels" both for private assigned lawyers and public defenders. *See* Mass. G. L., Chapter 211D, §9 (c) (2009).

[38] Consider, for example, the law in Colorado pertaining to the Colorado State Public Defender: "The state public defender shall represent as counsel...each indigent person who is under arrest for or charged with committing a felony." Colo. Rev. Stat. § 21-1-103 (2004); "Case overload, lack of resources, and other similar circumstances shall not constitute a conflict of interest." Id. at § 21-2-103. This statute is contrary to rules of professional conduct governing lawyers and with these Guidelines.

In addition to the options listed in this Guideline for dealing with excessive caseloads, there may be other ways in which Public Defense Providers can seek to achieve caseload reductions. For example, two national studies issued in 2009 recommended that legislatures consider reclassifying certain offenses as civil infractions so that the need to provide lawyers is removed, assuming there are not adverse public safety consequences.[39] However, if this course is followed, it is important that the possible adverse collateral consequences resulting from a conviction be carefully considered along with any new legislation since a defense lawyer will not be available to counsel the person.[40] Another alternative that can serve to reduce public defense caseloads is for cases to be diverted from the criminal justice system during the pretrial stage. Depending on the jurisdiction, implementation will require legislation, a change in court rules, or approval of prosecutors.[41]

When a Provider cannot reduce excessive lawyer workloads, a motion filed with the court, aimed at stopping case assignments and/or permitting lawyers to withdraw from cases (see Guideline 6 *infra*), or conceivably the filing of a separate civil action, will be necessary. Regardless of the type of litigation pursued, it is almost certain to be time-consuming, labor intensive, and the results not easily predicted. In addition, speedy resolution of the matter may prove elusive. If a trial court decision is adverse to the Provider, an appeal may be required. If the Provider is successful in the trial court, the state may appeal. Moreover, the trial court may simply fail to render a prompt decision

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[39] The National Association of Criminal Defense Lawyers has urged that "[o]ffenses that do not involve a significant risk to public safety...be decriminalized" and cites successful examples where this has occurred. *See* MINOR CRIMES, *supra* note 1, at 27-8. Similarly, the National Right to Counsel Committee has suggested that "certain non-serious misdemeanors...be reclassified, thereby reducing financial and other pressures on a state's indigent defense system," and also notes examples where this has taken place. *See* JUSTICE DENIED, *supra* note 1, at 198.

[40] "Under these circumstances, to impose harsh collateral consequences of a conviction, like housing limitations, deportation, and employment limitations would be fundamentally unfair." MINOR CRIMES, *supra* note 1, at 28.

[41] *See* John Clark, PRETRIAL DIVERSION AND THE LAW: A SAMPLING OF FOUR DECADES OF APPELLATE COURT RULINGS I-1-I-2 (Pretrial Justice Institute 2006).

in the matter. Accordingly, every effort should be made to resolve excessive workloads without resort to litigation, which is why the options specified in Guideline 5 are so important.

6. **Public Defense Providers or lawyers file motions asking a court to stop the assignment of new cases and to withdraw from current cases, as may be appropriate, when workloads are excessive and other adequate alternatives are unavailable.**

Comment

When alternative options for dealing with excessive workloads, such as those listed in Guideline 5, are exhausted, insufficient, or unavailable, the Public Defense Provider is obligated to seek relief from the court. Thus, a court should be asked to stop additional assignments in all or certain types of cases and, if necessary, that lawyers be permitted to withdraw from representation in certain cases. Continued representation in the face of excessive workloads imposes a mandatory duty to take corrective action in order to avoid furnishing legal services in violation of professional conduct rules.[42] If representation is furnished pursuant to court appointment, withdrawal from representation usually requires judicial approval.[43] Because lawyers have as their primary obligation the responsibility to represent the interests of current clients, withdrawals from representation is less preferable than seeking to halt the assignment of new appointments.[44] Normally, Providers, rather than individual lawyers, will take the initiative and move to suspend new case assignments and, if necessary, move to withdraw from cases since the Provider has the responsibility to monitor lawyer workloads (Guideline 1), determine whether workloads are excessive (Guideline 4), and explore options other than litigation (Guideline 5). If the Public Defense

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[42] *See* ABA MODEL RULES, supra note 3, R. 1.16 (a)(1), quoted in note 29 *supra*. *See also* discussion in Comment to Guideline 1 *supra*. It may also be appropriate to include in a motion to withdraw a request that charges against one or more clients be dismissed due to the failure of the government to provide effective assistance of counsel as required by federal and state law.

[43] "When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority." ABA MODEL RULES, *supra* note 3, R. 1.16, cmt. 2.

[44] "A lawyer's primary ethical duty is owed to existing clients." ABA Formal Op 06-441, *supra* note 2, at 4.

Provider has complied with Guidelines 1 through 4, it should be in an especially strong position to show that its workload is excessive, and its representations regarding workloads should be accepted by the court.[45] Nevertheless, in making its motion to the court, the Provider may deem it advisable to present statistical data, anecdotal information, as well as other kinds of evidence.[46] The Provider also may want to enlist the help of a private law firm with expertise in civil litigation that is willing to provide representation on a pro bono basis. There are notable examples in which private firms have volunteered their time and been extremely helpful to Providers in litigating issues related to excessive workloads.[47] As discussed earlier, an individual lawyer is obliged to take action when there is disagreement with those in charge of the Provider about whether the lawyer has an excessive workload and the lawyer concludes that Provider officials have made an unreasonable decision respecting the matter.[48]

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[45] *See also infra* notes 49-52 and accompanying text.

[46] *See* discussion of litigation respecting such motions in JUSTICE DENIED, *supra* note 1, at 144-45.

[47] The following observation, offered in discussing the role of volunteer lawyers in litigating systemic challenges to indigent defense systems, is also applicable to litigating motions to withdraw and/or to halt additional appointments: "[E]xternal counsel affiliated with law firms, bar associations, or public interest organizations who are willing to provide pro bono representation can make significant contributions. Besides possessing the necessary experience, they are likely to have more time, personnel, and resources than do public defenders to devote to a major systemic challenge. They also are used to conducting extensive discovery, preparing exhibits, and may have funds to retain necessary experts." *Id* at 143.

[48] *See supra* notes 27-28 and accompanying text. *See also* ABA Model Rules, *supra* note 3, R. 5.2 (b), quoted in note 22 *supra*. See also Norman Lefstein and Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, 30 THE CHAMPION 12-13 (Nat'l Assoc. Crim. Defense Lawyers, December 2006); and ABA Formal Op 06-441, *supra* note 2, at 1, 4-6. In 2009, a California appellate court endorsed the approach of the ABA's ethics opinion: "Under the ABA opinion, a deputy public defender whose excessive workload obstructs his or her ability to provide effective assistance to a particular client should, with supervisorial approval, attempt to reduce the caseload, as by transferring cases to another lawyer with a lesser caseload. If the deputy public defender is unable to obtain relief in that manner, the ABA opinion provides that he or she must 'file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.'... The conduct prescribed by the ABA Opinion, which is fully consistent with the California Rules of Professional Conduct, may also be statutorily mandated." In re Edward S.,173 Cal. App. 4th 387, 413, 92 Cal. Rptr. 3d 725, 746 (Cal. App. 1st Dist. 2009). This decision cites with approval an earlier California decision, Ligda v. Superior Court, 85 Cal. Rptr. 744, 754 (Cal. Ct. App. 1970)("[w]hen a public defender reels under a staggering workload, he

7. **When motions to stop the assignment of new cases and to withdraw from cases are filed, Public Defense Providers and lawyers resist judicial directions regarding the management of Public Defense Programs that improperly interfere with their professional and ethical duties in representing their clients.**

Comment

The concern that underlies this Guideline relates to the risk that judges confronted with motions to halt the assignment of new cases or to permit lawyers to withdraw from cases will delve inappropriately into the internal operations of Public Defense Providers. While it is appropriate for judges to review motions asking that assignments be stopped and withdrawals from cases are permitted, courts should not undertake to micro-manage the operations of defense programs.[49]

When Providers file motions requesting that assignments be stopped and that withdrawals be permitted, their prayer for relief should be accorded substantial deference because Providers are in the best position to assess the workloads of their lawyers. As the ABA has noted, "[o]nly the lawyers themselves know how much must be done to represent their clients and how much time the preparation is likely to take."[50] In discussing a defense lawyer's claim of conflict of interest in representing co-defendants, the Supreme Court has noted that "attorneys are officers of the court, and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'"[51] In an accompanying footnote, the Court further declared: "When a considered representation

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... should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel at public expense.")

[49] "We acknowledge the public defender's argument that the courts should not involve themselves in the management of public defender offices." *In re Certification of Conflict in Motions to Withdraw*, 636 So.2d 18, 21-22 (Fla. 1994).

[50] ABA PROVIDING DEFENSE SERVICES, *supra* note 4, at 71. See also State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984)("Attorneys are in a position to know when a contract [for defense services] will result in inadequate representation of counsel.")

[51] Holloway v. Arkansas, 435 U.S. 475, 486 (1978).

regarding a conflict of interest comes from an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation."[52]

The ABA has recognized that the judiciary needs to ensure that Providers and their lawyers are not forced to accept unreasonable numbers of cases: "Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations."[53] This Guideline is a corollary to the well accepted proposition that defense services should be independent of the judicial and executive branches of government.[54] Thus, an ABA standard recommends that "[t]he selection of lawyers for specific cases should not be made by the judiciary or elected officials...."[55] This same standard also urges that the plan for

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[52] *Id.*, at n. 9. Judges should be especially understanding of the representations of Providers given that the "judiciary plays a central in preserving the principles of justice and the rule of law." ABA CODE OF JUDICIAL CONDUCT, Preamble (2007). Similarly, prosecutors have a duty "to seek justice ... [and] to reform and improve the administration of criminal justice." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION STANDARDS, Std.3-1.2 (c), (d) (3rd ed., 1993). However, when a Provider seeks relief in court from an excessive workload, the prosecutor seemingly has a conflict of interest in opposing the Provider's motion. Not only do the decisions of prosecutors in filing charges against persons directly impact the caseloads of Providers, but the likelihood of successful prosecutions are enhanced if Providers are burdened with excessive caseloads. The adversary system is premised on the assumption that justice is best served when both sides in litigation are adequately funded and have sufficient time to prepare their respective cases.

[53] ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-5.3 (b). Sometimes the problem is not the number of cases, but the pressure placed on defense lawyers to proceed when they have not had sufficient time to prepare. In an Ohio case, a public defender was prepared to represent his client, but asked for a continuance before proceeding to trial because he had just been appointed earlier the same day and lacked sufficient time to interview witnesses. The trial court denied the public defender's request for a continuance and held the lawyer in contempt because of his refusal to proceed to trial. In reversing the contempt finding, the court concluded that the trial judge had "improperly placed an administrative objective of controlling the court's docket above its supervisory imperative of facilitating effective, prepared representation at trial." State v. Jones, 2008 WL 5428009, at *5 (Ohio App. 2008).

[54] "The legal representation plan for the jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be...subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary...." ABA PROVIDING DEFENSE SERVICES, *supra* note 4, at Std. 5-1.3 (a).

[55] *Id.*

legal representation "guarantee the integrity of the relationship between lawyer and client."[56]

8. Public Defense Providers or lawyers appeal a court's refusal to stop the assignment of new cases or a court's rejection of a motion to withdraw from cases of current clients.

Comment

The ABA Standing Committee on Ethics and Professional Responsibility has indicated that a trial court's denial of motions to halt appointments or to withdraw from pending cases should be appealed, if possible.[57] An appeal or an application for a writ of mandamus or prohibition should properly be regarded as a requirement of "diligence" under professional conduct rules.[58] However, if a defense motion is rejected and an appeal is not permitted, the Public Defense Provider usually has no choice except to continue to provide representation.[59] Similarly, if the motion for relief is granted but implementation of the order is stayed pending appeal, the Provider will likely have to continue to provide representation.[60] This places the Provider in an extremely awkward situation since on the one hand those in charge of the defense program have made it clear that, in their professional judgment, caseloads are excessive and the lawyers providing direct client services are being forced to violate their ethical responsibilities, yet relief is unavailable. Accordingly, the Provider should continue to explore non-litigation alternatives (*see* Guideline 5) while requiring the Provider's lawyers to make a record in their cases, if

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[56] *Id.*

[57] "If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant." ABA Formal Op 06-441, *supra* note 2, at 1.

[58] "A lawyer should pursue a matter on behalf of a client...and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with zeal in advocacy upon the client's behalf." ABA MODEL RULES, *supra* note 3, R. 1.3, cmt. 1.

[59] "When ordered to do so, by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." *Id., R.* 1.16 (c). *See also supra* note 32.

[60] However, the Provider or lawyer also will likely want to proceed expeditiously in the appellate court to strike the stay or modify the order pending appeal.

appropriate, about the lawyers' inability, due to excessive caseloads, to furnish "competent" and "diligent" representation as required by professional conduct rules. The Public Defense Provider should also continue to seek public support from bar associations, community groups, and the media.[61]

[61] "Theoretically, when judges resolve court cases concerning indigent defense reform, it should be irrelevant whether the litigation is covered by print and other news media. Nor should it matter whether prominent persons in the state or community speak publicly in favor of necessary changes in the delivery of indigent defense services. However, the reality is that news reports about problems in indigent defense and strong public support for improvements may make a difference not only when legislatures consider new laws, but also when courts decide difficult cases." JUSTICE DENIED, *supra* note 1, at 146.

Report

Introduction

Throughout the United States, there is a lack of adequate funding to provide legal representation for persons in criminal and juvenile delinquency cases who have a Constitutional right to a lawyer but are unable to afford representation. As a result, public defender agencies and their lawyers are routinely faced with enormous caseloads. Defenders, therefore, are unable to represent their indigent clients effectively as required by the Sixth Amendment to the U.S. Constitution and from providing competent and diligent representation as required by rules of professional conduct.

The **Eight Guidelines of Public Defense Related to Excessive Workloads** [hereinafter "Guidelines"] contain a well thought out course of action not only for public defender agencies forced to deal with too many cases, but also for other providers of indigent defense services with excessive workloads. These include lawyers who accept appointments to cases as part of an assignment program and lawyers who enter into contracts to provide indigent defense services.

Excessive Caseloads Are a National Problem

The problem of excessive caseloads among public defense providers has been documented in numerous national, state, and local reports over a period of many years. Recently, two national reports on indigent defense services in the United States were published. The first of these was released in April 2009 by the Constitution Project, on behalf of the National Right to Counsel Committee, an independent and diverse group representing all major constituencies of the justice system, i.e., the judiciary, prosecution, police, and the defense. The Committee was organized by the Constitution Project and the National Legal Aid & Defender Association. In its report, the Committee offered the following assessment of public defense caseloads:

> Undoubtedly, the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads. Frequently, public defenders are asked to represent far too many clients. Sometimes the defenders have well over 100 clients at a time, with many clients charged with serious offenses, and their cases moving quickly through the court system. As a consequence, defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources. Yes, the clients have lawyers, but lawyers with crushing

caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise.[62]

The second recent national study, published in May 2009 by the National Association of Criminal Defense Lawyers, focuses on the problems of indigent defense representation in misdemeanor cases. The report summed up the caseload problems in lower courts this way:

> Almost 40 years later, the misdemeanor criminal justice system is rife with the same problems that existed prior to the *Argersinger* decision.[63] Legal representation for indigent defendants is absent in many cases. Even when an attorney is provided to defend a misdemeanor case, crushing workloads make it impossible for many defenders to effectively represent clients. Too often, counsel is unable to spend sufficient time on each of their cases. This forces even the most competent and dedicated attorneys to run afoul of their professional duties. Frequently, judges and prosecutors are complicit in these breaches, pushing defenders to take action with inadequate time, despite knowing that the defense attorney lacks appropriate information about the case and the client.[64]

In 2004, the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) issued the Association's most recent national report on indigent defense services. This report, based upon hearings held at four locations across the country during 2003,[65] commemorated the fortieth anniversary of the Supreme Court's decision in *Gideon v. Wainwright*.[66] In referring to the number of cases that public defenders are asked to handle, the report summarized the testimony of numerous witnesses: "[T]he hearings revealed that oftentimes caseloads...[make] it impossible for even the most industrious of lawyers to deliver effective representation in all cases."[67] Twenty-two years earlier, SCLAID offered a similar assessment of caseloads of those providing public defense services.[68]

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[62] JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 17 (The Constitution Project 2009)[hereinafter JUSTICE DENIED].

[63] This is a reference to the Supreme Court's decision in Argersinger v. Hamlin, 407 U.S. 25 (1972). This decision essentially established the right to a lawyer at government expense in misdemeanor cases.

[64] MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (National Association of Criminal Defense Lawyers 14 (2009).

[65] GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (American Bar Association 2004).

[66] 372 U.S. 375 (1963).

[67] *Id.* at 18

[68] *See* GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (American Bar Association, John Thomas Moran ed., 1982).

ABA Ethics Opinion Dealing with Excessive Caseloads

In 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-441 concerning the ethical obligations of indigent defense lawyers burdened with excessive caseloads. The opinion made clear that there are "no exceptions" for lawyers who represent indigent clients – *all* lawyers have a duty to furnish "competent" and "diligent" service, as required by rules of professional conduct. Accordingly, as directed by the ABA Model Rules of Professional Conduct, the opinion admonishes defense programs and lawyers to move to withdraw from cases if they are unable to furnish representation in compliance with their ethical duties. The opinion also advises lawyers that if clients are being assigned through a court appointment system, which is often what occurs in indigent defense, the lawyers should advise the court not to make any new appointments.

Formal Opinion 06-441, therefore, sets forth several basic steps that those providing defense services should take when faced with excessive caseloads. However, the opinion does not contain *a detailed action plan* to which public defense providers should adhere as they seek to comply with their professional responsibilities. The purpose of the proposed Guidelines is to do just that, as more fully explained below.

ABA Standards and Principles Related to Excessive Caseloads

Much like the ABA's new ethics opinion concerning indigent defense representation, a detailed plan for dealing with excessive caseloads is lacking in the ABA's Standards for Criminal Justice and in the ABA Ten Principles of a Public Defense Delivery System. This is understandable since neither these standards nor principles deal with subjects in as much detail as contained in the proposed Guidelines. Thus, a standard in the ABA's Defense Function Standards simply advises "[d]efense counsel...[not to] carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations."[69] Similarly, the ABA's Providing Defense Services Standards urges indigent defense lawyers with excessive caseloads to "take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments."[70] The ABA's Ten Principles of a Public Defense Delivery System, which is largely based on Providing Defense Services, reads as follows: "Defense counsel's workload is controlled to permit the rendering of quality representation."[71]

The Eight Guidelines: Why They Are Needed and What They Do

The problem of excessive indigent defense caseloads has become especially acute during the past year due to America's slumping economy, which has led to more

[69] ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION 4-1.3 (e)(3d ed., 1992).

[70] ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 5-5.3(b)(3d ed., 1992).

[71] ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (2002).

restricted funding for public defense providers. As the recent report of the National Right to Counsel Committee warned, "[i]n the country's current economic crisis, indigent defense may be further curtailed.... Although troubles in indigent defense have long existed, the need for reform has never been more urgent."[72] The proposed Eight Guidelines build upon the ABA's Formal Opinion 06-411, the ABA's Criminal Justice Standards, and the ABA's Ten Principles of a Public Defense Delivery System. Because the Guidelines contain a complete and coherent approach to dealing with excessive defender caseloads, their implementation by indigent defense providers will contribute to important reform at an especially critical time.

Specifically, Guideline 1 advises the management of public defense providers to assess whether excessive workloads are preventing lawyers from fulfilling their performance obligations under nationally accepted standards, as well as complying with professional conduct rules. This first Guideline also offers an important list of factors for public defense providers to consider in deciding whether their caseloads are too high. Guidelines 2, 3, and 4 relate to the need for continuous supervision and monitoring of workloads, training of lawyers respecting their ethical responsibilities when confronted with excessive workloads and the need for management to determine if excessive workloads exist. Guideline 5 sets forth a number of non-litigation alternatives for public defense providers to pursue in an effort to address excessive workloads. Guideline 6 recognizes that if non-litigation alternatives are "unavailable, or been proven to be unsuccessful or inadequate," those responsible for public defense are obligated to seek formal redress in the courts. Guidelines 7 and 8 deal with important practices to which public defense providers should adhere in challenging their caseloads through litigation.

Conclusion

The proposed Guidelines will enhance the fairness of our nation's criminal and juvenile courts while enabling lawyers to discharge their duty under the Constitution and also comply with their ethical obligations in accordance with rules of the legal profession. The Guidelines are intended for use by both public defense organizations and their lawyers when they have excessive workloads. In addition, the Guidelines should be valuable to a number of other audiences, including members of boards and commissions that oversee public defense representation, policymakers responsible for funding indigent defense, and judges who are called upon to address the caseload concerns of those who provide public defense services. Moreover, since these Guidelines relate directly to the quality of justice in our courts, they should be of special interest to bar leaders, as well as to the legal profession and to the public.

Respectfully submitted,

Deborah G. Hankinson, Chair
Standing Committee on Legal Aid and Indigent Defendants

August, 2009

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[72] JUSTICE DENIED, *supra* note 1, at 2.